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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

No. 835

J. A. ZACHARIASSEN & CO.,
Petitioners,

vs.

THE UNITED STATES.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CLAIMS AND BRIEF IN SUPPORT THEREOF.

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vs. *Petitioners,*

THE UNITED STATES.

PETITION FOR WRIT OF CERTIORARI.

To the Honorable the Chief Justice of the United States, and the Associate Justices of the Supreme Court of the United States:

Your petitioners, J. A. Zachariassen & Co., respectfully submit their petition for a writ of certiorari to review the decision of the United States Court of Claims dismissing the petition in that Court.

Summary Statement of the Matter Involved.

Petitioners are a Finnish copartnership, and instituted this suit in the Court of Claims for losses sustained as a result of the uncompensated detention of the sailing vessel ALBYN in New York Harbor from March 23, 1918, until July 31, 1918.

This and eleven similar claims in behalf of the owners of other Finnish sailing vessels named in the jurisdictional act hereinafter set forth, were filed originally with the State Department by the Finnish Minister to the United States, pursuant to instructions from his government. Said claims were pending in the State Department for a number of years prior to June 28, 1936, when an Act of Congress (49 Stat. 2368) authorizing suits in the Court of Claims was approved by the President.

The Act is set forth in full at pages 1-3 of the record. Section 2 thereof reads as follows:

> "Sec. 2. In determining the said claims, the Court of Claims shall pass solely on the following questions:
>
> "1. Were the thirteen Finnish sailing vessels named herein, or any one or more of them, detained by the United States?
>
> "2. If the preceding question is answered in the affirmative, was such detention unlawful?
>
> "3. If the second question is answered in the affirmative, is the United States obligated to indemnify the owner or owners, or their successors in interest, of the vessel or vessels found to have been unlawfully detained?
>
> "4. If the third question is answered in the affirmative, what indemnity should be paid by the United States with respect to each vessel found to have been unlawfully detained?"

All twelve suits have been tried, but a decision has been rendered in this case only and Special Findings of Fact and Conclusions of Law were made upon which judgment was entered on June 2, 1941, dismissing plaintiffs' petition. The Court of Claims found, in answer to the first question that the ALBYN was detained (Special Finding of Fact No. 17, R. 28).

In answer to the second question, the Court found that the detention was not unlawful (Special Finding of Fact No. 18, R. 28).

Although the Court need not have gone further after finding that the detention was not unlawful, it nevertheless did find, in answer to the third question, that "If it should be held that the ALBYN was unlawfully detained" the United States would be obligated to indemnify the owners for the damages sustained (Special Finding of Fact No. 20, R. 28).

In answer to the fourth question, the Court found that the United States should pay the owners $61,139.62 (Special Finding of Fact No. 20, R. 28).

A timely motion for a new trial, filed on July 30, 1941, was denied without opinion on October 6, 1941 (R. 36).

The judgment of dismissal is final, and this petition is filed to obtain a review of the decision of the Court of Claims, in accordance with the last sentence of Section 5 of the Jurisdictional Act.

The ALBYN was chartered on December 18, 1917, to Vacuum Oil Company for a cargo of petroleum in cases from New York to ports in British territory on the east coast of South Africa (Special Finding of Fact No. 4, R. 10-11).

The charter was approved by the United States Shipping Board on December 21, 1917, pursuant to the provisions of the Shipping Act, and by the Inter-Allied Chartering Committee of London, England, on December 18, 1917, pursuant to the provisions of said charter (Special Finding of Fact No. 4, R. 10-11). License for the export of the cargo was granted to Vacuum Oil Company by the War Trade Board, pursuant to the provisions of the Espionage Act, prior to December 18, 1917 (Special Finding of Fact No. 5, R. 11).

The ALBYN arrived in New York Harbor on February 14, 1918, made ready for loading under said charter, began loading on March 14, 1918, completed loading on March 22, 1918, and was ready to sail on March 23, 1918. The vessel

loaded 85,256 cases of petroleum upon which a total freight of $98,897.25 was paid in accordance with the terms of the charter (Special Finding of Fact No. 6, R. 11).

On March 18, 1918, J. F. Whitney & Co., the New York agents for the ALBYN, applied to the War Trade Board for a bunker license for ship's stores necessary for the voyage, in accordance with the provisions of the Espionage Act and regulations issued by the War Trade Board, which had been created by the President for the administration of said Act (Special Finding of Fact No. 9, R. 16-17).

The bunker license was refused until July 12, 1918, on which date it was granted (Special Finding of Fact No. 9, R. 16-17). Thereafter the vessel again made ready for sea, re-stocked her supplies, obtained a new crew, and sailed as promptly as possible thereafter, on July 31, 1918, carrying the same cargo that had been loaded in March, under the charter to Vacuum Oil Company, to the ports therein named (R. 54-55, 57, Special Finding of Fact No. 17, R. 28).

When the requested bunker license did not arrive within the usual few days after application was made therefor on March 18th, inquiry was made by the ship's agents at the War Trade Board Office in New York, but no information could be obtained except that the delay was undoubtedly due to routine in the Washington office (R. 102-103). On March 22nd, when the vessel otherwise was ready to sail, application was made at the Custom House in New York for clearance of the vessel, but when it was explained that no bunker license was being presented, due apparently to routine delay thereon in the Washington Office of the War Trade Board, clearance was refused, solely because no bunker license was presented (Special Finding of Fact No. 10, R. 17).

Continuously thereafter, until April 17th, the ship's agents inquired of the War Trade Board for said license, as well as for similar licenses for others of the thirteen Finnish vessels named in the jurisdictional act, which had begun

to arrive in New York and load under charters for similar voyages, without results (R. 39-40, 102-104).

On April 17th a representative of the Shipping Board called at the office of the ship's agents in New York, and made an offer to charter the ALBYN and the said other Finnish vessels and stated that until and unless the vessels were chartered to the Shipping Board they would not be allowed to sail (R. 41-42, 59-60, Deft's Ex. No. 16, R. 212).

On April 18th, the ship's agents received a letter from the Shipping Board, referring to the Woodburn, another one of the vessels involved, advising that "at present no Russian vessel is allowed to leave American ports."

The reference to "Russian" vessels is due to the fact that these Finnish vessels had sailed from foreign ports, flying the Russian flag, while Finland was still a Grand Duchy of Russia and upon arrival were entered as "Russian" vessels. Although the masters immediately cabled abroad for a description of Finland's flag, and replaced the Russian flag with the new Finnish flag, the vessels were referred to in contemporary correspondence sometimes as Russian vessels, sometimes as Finnish vessels and sometimes as Russian-Finnish vessels. The Court of Claims has so found (Special Finding of Fact No. 11, R. 17).

On April 24th, in response to suggestions from the ship's agents to the Shipping Board for a modification of the Shipping Board's proposed charter of the vessels in order to make it acceptable to the owners, the Shipping Board advised the ship's agents that the principal point involved in the Board's offer to charter the vessels was "the removal of the crews" (R. 128).

The disposition of these Finnish ships had been the subject of extended discussions in the War Trade Board, the Shipping Board and the State Department prior to April 17th, when the Shipping Board's representative called at the office of the ship's agents and offered to charter the vessels. On April 3rd, the War Trade Board wrote the Ship-

ping Board saying that they were strongly in favor of the vessels being taken over by the Shipping Board or one of our Allies, because the personnel of the crews made them an undesirable risk, and on the same day the Shipping Board instructed one of its employees to investigate the situation and report his recommendations thereon, adding, "In the meantime the ships will be held" (Deft's. Ex. No. 13, R. 210. Special Finding of Fact No. 11, R. 17, 18).

The attitude of the War Trade Board and the Shipping Board in the matter is summarized in a letter from the Shipping Board to the British War Mission, dated April 12th, as follows:

"Captain Thos. Fisher,
British War Mission,
Munsey Bldg.,
Washington, D. C.

DEAR SIR:

RUSSIAN SAILING VESSELS

When you were last here, we talked over the question of the Russian Sailing Vessels ALBYN, PROMPT, and PROFESSOR KOCH.

These vessels were all approved by the Chartering Committee some months back and we could not understand why the War Trade Board was holding them up. They now tell us that all Russian sailing vessels are being held and the matter has been the subject of many discussions before the War Trade Board. It seems to be a question of these vessels being manned by Russian crews and the American Government do not seem to be willing to trust these vessels to go to sea fully manned by Russians.

This matter you might take up with Mr. Munson and he will, no doubt, be in a position to advise you fully.

Yours very truly,
FOR THE COMMITTEE."

JBS/TGA.

(Deft's. Ex. No. 14, R. 211.)

On April 20th, the War Trade Board adopted a resolution authorizing its licensing bureau to refuse bunker licenses for vessels "whereof the owners, masters or officers are reported by the Bureau of War Trade Intelligence to be suspected of enemy affiliations or of being engaged in enemy activities" (Deft's. Ex. No. 12, R. 210).

No evidence was offered by the government to show that the Bureau of War Trade Intelligence ever reported that the "owners, masters or officers" of these Finnish vessels were "suspected of enemy affiliations or of being engaged in enemy activities". But the Shipping Board's representative who was attempting to negotiate a charter of these vessels, did report to his superior after his first conference with Whitney & Company, that it had been reported to him that "the greatest part of the crew and masters had the worst reputation. Some of them are openly pro-German and, not considering political feelings, they are far from reliable in many questions, and spend most of their time drinking" (Deft's. Ex. No. 16, R. 212).

Following the Shipping Board's offer on April 17th to charter the vessels, negotiations therefor continued until June 10th, when the Shipping Board advised the ship's New York agents that the Board was no longer interested in chartering the vessels (Special Finding of Fact No. 11, R. 17, 18-19, 24-25).

A week later, June 17th, the owners' London agents took up the matter with the American War Trade Department, which was connected with the American Embassy in London, and inquired what could be done in order to have the vessels released, and on June 18th, the American Charge d'Affairs at the London Embassy cabled the Secretary of State at Washington, advising of this inquiry and asking what was required to settle the matter (R. 164, Special Finding of Fact No. 13, R. 23).

On June 20th, the War Trade Board instructed its Bureau of Transportation as follows:

> "Upon agitation with the State Department regarding the following Russian sailing vessels (Albyn, Fahrwohl, Professor Koch, Kensington and Prompt), they have decided that perhaps it will be all right to let them proceed to South Africa, provided we are perfectly sure that none of the crews are Bolsheviki; or sympathizers with the Bolsheviki regime.
>
> "Please take this up with the Navy and have the crews gone over with a fine tooth comb, preparatory to taking some action towards allowing them to go" (Special Finding of Fact No. 13, R. 23).

On June 21st, the War Trade Board's Bureau of Transportation requested the Naval Intelligence Bureau of the Navy to investigate the crews of the Finnish vessels, saying that "the situation with regards Russian vessels has been a somewhat delicate one, and we have felt it was rather unsafe to allow such vessels to proceed" (Special Finding of Fact No. 14, R. 24-25).

On June 27th, that is, within one week from the date the investigation was ordered, Naval Intelligence made a lengthy report of its investigation of the crews to the War Trade Board, in which it was found that the War Trade Board's suspicions of the crews were wholly unfounded (Special Finding of Fact No. 14, R. 24-27), and on July 9th, the War Trade Board, by reason of this report, directed the issuance of the bunker license for the ALBYN, and it was issued on the 12th (Special Finding of Fact No. 15, R. 26-27).

Some contemporary correspondence and documents were offered in evidence upon the trial which indicated that, in addition to the foregoing suspicions against the crews, the State Department and War Trade Board were disturbed by the political situation in Russia and Finland, following

Russia's military defeat by Germany, the Russian Revolution and Finland's Declaration of Independence of Russia, and this fact, also, apparently had some bearing on the delay in issuing a bunker license (R. 145-147, 154-155).

The Court of Claims, by its Special Finding of Fact No. 16, finds that "the conditions and circumstances which formed the basis" for the failure of the War Trade Board to grant license for necessary ship's stores and supplies, that is, the bunker license, were

> "(a) the probability of the vessels proceeding through the war danger zone, and, due to their speed, their possible seizure by enemy craft and the appropriation of the cargoes and stores for enemy purposes; (b) the uncertainty of the political situation in Russia and Finland, and (c) the character and responsibility of the officers and crews of the vessels" (R. 27).

and further found that the detention under such circumstances was not unlawful (Special Finding of Fact No. 18, R. 28).

We have not referred previously to the alleged "probability" of the ALBYN'S proceeding through a war danger zone as one of the reasons for the withholding of the bunker license, because petitioners contend that there is no evidence in the record whatever which justifies such a finding. The only testimony on this point is that no such reason was ever given the ship's agents while the ALBYN was detained (R. 47, 58-59), and the contemporary documents, including the correspondence between the ship's agents and the Shipping Board and the War Trade Board (R. 117-163), and contemporary inter-office memoranda of the last named organization (R. 179-219), contain no statement that could possibly be construed as an objection to the sailing of this vessel on any such ground.

Also the offer by the Shipping Board to cause said vessel to make the same voyage which she proposed to make under

the charter with Vacuum Oil Company (R. 59-60, 126-127), and which the ALBYN did make later, if the ALBYN were chartered to the Shipping Board, is conclusive evidence that no such objection was ever raised, or could be raised.

Furthermore, the records of the Custom House at New York City, which are in evidence, (Pltff's Ex. No. 15, R. 166-168) show that, during the period that the ALBYN was detained, 117 other sailing vessels, of various other nationalities, were granted bunker licenses and cleared from New York on voyages through the North Atlantic similar to the voyage that the ALBYN proposed to make. This fact also demonstrates that the voyage which the ALBYN proposed to make was not barred by War Zone restrictions, and that that was not one of the reasons why said vessel was detained.

The documents offered in evidence by the government relating to the so-called danger zone show only that the subject of war danger zones was one of constant discussion and great confusion, (R. 173-179, 218-219) but they show conclusively (Deft's Ex. No. 30, R. 216-218) that the boundaries were fixed for the express purpose of not interfering with the continued use of sailing vessels on voyages such as was planned by the ALBYN.

Questions Presented.

1. Did the War Trade Board act lawfully in detaining for 130 days the Finnish owned and registered sailing ship ALBYN, loaded in March, 1918, in New York, with cargo licensed by the War Trade Board for export to a British port on the east coast of South Africa, under a charter approved by the Shipping Board and the Inter-Allied Chartering Committee of London by refusing a bunker license for ship's stores necessary for said voyage, because of suspicions of "the character and responsibility of the officers and crew" of said vessel, when such suspicions were proven

unfounded by the government within one week from the date investigation thereof was requested by the War Trade Board near the end of the period of detention?

2. Did the War Trade Board act lawfully in detaining said ship for 130 days by refusing a bunker license for ship's stores necessary for said voyage because of "the uncertainty of the political situation in Russia and Finland", following the Russian Revolution in 1917, Finland's Declaration of Independence of Russia, and the withdrawal of Russia as an active ally of the United States and other allied nations against Germany and Austria?

3. Did the War Trade Board act lawfully in preventing said ship for 130 days from starting such voyage on the alleged ground that said voyage "probably" would take the vessel into a war danger zone when it appears that during the time the ALBYN was so detained.

(a) 117 other sailing vessels of various other nationalities were granted bunker licenses and clearances for similar voyages,

(b) the Shipping Board offered to cause the ALBYN to make the same voyage with the same cargo if said vessel were chartered to it,

(c) the Shipping Board by approval of the ALBYN'S charter sanctioned the proposed voyage,

(d) the alleged ground neither existed nor was asserted at any time during the detention?

4. For the purpose of computing the daily earning value of said vessel, assuming that the ALBYN was unlawfully detained, should the period between the date of the discharge of her cargo and the date she started on another voyage be added to the time required for the vessel to earn the freight moneys paid under the charter to Vacuum Oil Company?

5. If it be found that the ALBYN was unlawfully detained, are not the owners entitled to recover interest on the amount of damages sustained as a part of the "indemnity" which the Act of Congress authorizing the suit directs shall be determined?

Reasons for Granting Petition.

The grounds upon which the writ of certiorari is asked are that

(a) The case has been decided contrary to both local and International Law, in holding that unfounded suspicions against the officers and crew of the ALBYN constitute a defence to a claim for damages sustained as a result of the detention.

(b) The case has been decided contrary to both local and International Law, in holding that the uncertainty of the political situation in Russia and Finland constituted a defense to a claim for damages for preventing the ALBYN from making a voyage from New York to a port in British territory on the east coast of South Africa.

(c) The case has been decided contrary to the facts in holding that one reason for the detention of the vessel was the "probability" that said vessel would proceed through a war danger zone, and contrary to local and International Law, in preventing a Finnish vessel from making a voyage similar to voyages authorized by the United States for 117 vessels of other nationalities while the ALBYN was detained.

(d) The Court of Claims itself appears to be in doubt as to the correctness of its decision herein because,

(1) although under the terms of the special jurisdictional act the Court was not required to go further after deciding that the detention of the ALBYN was not unlawful, it nevertheless proceeded and decided that "if

it should be held that the Albyn was unlawfully detained;" the United States would be obligated to indemnify the owners for the damages sustained, and it also proceeded to determine the amount of the indemnity which the United States should pay;

(2) although all twelve suits brought under the special jurisdictional act were tried and argued in the Court of Claims at the same time, a decision in this one case alone has been rendered. The Court, apparently anticipating an appeal in this case, is apparently withholding decision in the other eleven suits until its decision in this case has been reviewed by this Court.

(e) The claim is one which has been sponsored by the Government of Finland, and should receive the consideration of this Court.

In addition to the points referred to in (a), (b) and (c) above, petitioners claim that two errors were made by the Court in fixing the amount of indemnity which should be paid, if it be found that the detention was unlawful, but in view of the fact that such questions become important only in the event that this Court should find that the detention was unlawful, we will not burden this Court with a discussion thereof in this petition for a writ of certiorari or in the supporting brief.

WHEREFORE, your petitioners respectfully pray that a writ of certiorari be issued out of and under the seal of this Honorable Court, directed to the United States Court of Claims, commanding that court to certify and to send to this Court for its review and determination on a day certain to be therein named a transcript of the record and the proceedings herein to the end that this cause may be reviewed and determined by this Court, as provided by law, and that the said judgment of the United States Court of Claims be reversed by this Honorable Court and the

cause remanded to that court with directions to proceed according to law, and that your petitioners have such other and further relief in the premises as to this Honorable Court may seem just and proper, and your petitioners will ever pray.

New York City, November 19, 1941.

J. A. ZACHARIASSEN & Co.,
Petitioners.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

No. 835

J. A. ZACHARIASSEN & CO.,

vs. *Petitioners,*

THE UNITED STATES.

BRIEF IN SUPPORT OF PETITION FOR CERTIORARI.

Opinion Below.

The opinion of the Court of Claims is not yet reported, but appears at pp. 30 to 36 of the record.

Jurisdiction.

The suit herein was instituted under a Special Act of Congress (49 Stat. 2368), the last sentence of which confers jurisdiction on this Court, on the petition of either party, to grant a writ of certiorari to the Court of Claims to review any determination rendered by the Court of Claims (R. 3).

Statement of Facts.

The facts have been sufficiently stated in the petition, but will be referred to from time to time in this brief.

ARGUMENT.

The grounds upon which the Court of Claims based its decision dismissing the action are set forth in its Special Finding of Fact No. 16, followed by its conclusion that those facts made the detention lawful. Special Finding of Fact No. 16 reads as follows:

> "16. The conditions and circumstances which formed the basis of the failure of the War Trade Board to grant licenses for necessary ship's stores and supplies, without which supplies the ships could not sail and without which licenses the ships could not obtain clearance, were (a) the probability of the vessels proceeding through the war danger zone, and, due to their speed, their possible seizure by enemy craft and the appropriation of the cargoes and stores for enemy purposes; (b) the uncertainty of the political situation in Russia and Finland, and (c) the character and responsibility of the officers and crews of the vessels" (R. 27).

(A.)

1. The finding numbered "(a)" that one of the reasons for the detention of the ship by the withholding of a bunker license because of the probability of the vessel's proceeding through the war danger zone, is without any evidence to support it.

The only testimony in the record on the point (Edgett, R. 59) is that no such objection was ever raised during the period of detention.

The only reasons stated in the contemporary correspondence and documents in evidence, including inter-office memoranda of the War Trade Board and the Shipping Board (R. 117-163, 179-219) are (1) the suspicions against the crews of the vessels and doubt as to the propriety of allowing the vessels to sail with those crews aboard, and (2) the uncertainty of the political situation then existing in Russia and Finland.

The Court's finding is inconsistent with the official action of the Shipping Board in approving the charter of the ALBYN (R. 119) which approval necessarily constituted an approval of the voyage which the vessel had to make in order to fulfill the terms of the charter. This action of the Shipping Board in approving the charter was taken pursuant to the provisions of the Shipping Act of 1917, as amended, under which the Shipping Board was authorized to approve or disapprove the charters, courses, voyages and trades in which vessels of different types might engage during the war period.

The Court's finding is contrary to every logical conclusion to be drawn from the fact that the Shipping Board offered to charter the vessel, and further offered to cause the vessel to carry out the charter which the owners had made for her with Vacuum Oil Company, which offer necessarily would cause the vessel to make the same voyage which she was prevented from making for over four months by the government's action in refusing a bunker license, and which voyage she did make as soon as she was released by the government.

It is contrary to every logical conclusion to be drawn from the fact established by the New York Custom House records (Plaintiffs' Ex. No. 15, R. 166-168). Those records, together with Plaintiffs' Ex. No. 18 (R. 172A) show that during the time the ALBYN was detained, 117 other sailing vessels, of other nationalities, were permitted to sail on voyages through the North Atlantic—the location of the war danger zones—similar to the voyage which the ALBYN proposed to make, which fact requires the conclusion that such voyages were not barred to sailing vessels by any government regulation.

Defendant's Exhibit No. 30 (R. 216) shows that the boundaries of the danger zone (fixed about one month after the ALBYN was detained, R. 185, 208-208A) were pur-

posely fixed so as not to interfere with the continued use of sailing vessels on these voyages:

In its Special Finding of Fact No. 8 the Court found:

> "During the period March 23 to July 31, 1918, the War Trade Board granted export cargo licenses and 'bunker' licenses to a number of vessels classed as sailing vessels under War Trade Board Regulations, but in those cases there were conditions, circumstances, and considerations with respect to the safety of the vessels, cargo, stores and supplies not present in the case of the ALBYN and other Finnish sailing vessels named in the jurisdictional act, upon the basis of which the War Trade Board decided to grant licenses upon which clearances were obtained" (R. 16).

Discussing the same subject in its opinion, the Court stated at page 29:

> "It is argued on behalf of plaintiff that the ship itself was the object of detention because other sailing vessels bound upon substantially similar voyages were granted licenses for cargoes and supplies, but we do not know the circumstances or reason which prompted the War Trade Board to grant those licenses" (R. 35).

The statement in the opinion is in accordance with the record. The statement in the Finding of Fact is without any evidence to support it. It was erroneously adopted from defendant's proposed Findings of Fact.

(B.)

1. In holding that the suspicions against the crew of the vessel constituted a defense to this claim, notwithstanding the fact that within one week from the date when an investigation thereof was ordered (near the end of the 130 day period of detention), the Bureau of Naval Intelligence established the fact that said suspicions were groundless,

the Court of Claims erroneously applied a rule which is applicable to Prize Cases, but which is not applicable to municipal seizures or detentions in port.

The rule applicable to the two classes of cases was stated by this Court in the early case of *The Apollon*, 9 Wheat. 362, as follows:

> "Some obscurity arose at the argument from not distinguishing between the effect of probable cause in cases of capture jure belli, and the effect in cases of municipal seizure. In respect to the former, no principle is better settled in the law of prize than the rule that probable cause will not merely excuse, but even, in some cases, justify a capture. If there be probable cause, the captors are entitled, as of right, to an exemption from damage; and if the case be of strong and vehement suspicion, or requires further proof to entitle the claimant to restitution, the law of prize proceeds yet further, and gives the captors their costs and expenses in proceeding to adjudication. But the case is far different in respect to municipal seizures. Probable cause has never been supposed to excuse any seizure, except where some statute creates and defines the exemption from damages. The party who seizes, seizes at his peril; if condemnation follows, he is justified; if an acquittal then he must respond in damages for the marine tort, unless he can shelter himself behind the protection of some statute."

The reason for the difference in the rules applicable to the two classes of cases is clear. In Prize Cases the captors are at sea; they must act promptly if their action is to be effective, and from the very nature of their situation, they must act, in most cases at least, solely upon suspicion. On the other hand, in the case of municipal seizures or detentions in port, the seizing or detaining officials have ample time and means to investigate their suspicions before making the arrest.

The rule applicable to cases involving municipal seizures or seizures in port, was applied in the following cases:

The Apollon, 9 Wheat. 362:
The Splendid, 4 Moore's Int. Arb. Cases, 3364;
The Labuan, 4 Moore's Int. Arb. Cases, 3721.

In the case of *The Apollon,* supra, the vessel was detained on suspicion that she was attempting to violate our local laws relating to entry and payment of entrance fees. Upon a failure to establish such intention, damages were awarded for the period of detention.

In the case of *The Labuan,* supra, the vessel loaded in New York for a Mexican port and was detained on suspicion that her crew, upon arrival in Mexico, might report to the Confederacy a large Union troop movement through New York. Upon a failure to establish such a probability, an award of damages for the period of detention was made by the Commission.

In distinguishing the facts in the *Labuan* case from the facts in the case of the *Zeelandia* (*Royal Holland Lloyd* v. *United States,* 73 Ct. Cls. 722), the Attorney General in his brief in the latter case (p. 203) approved the rule followed in the *Labuan* case in the following language:

> "Clearance was refused upon the mere suspicion that officers of the vessel might possibly reveal some military secrets to the Confederate forces. Manifestly there was no probable cause or reasonable ground for withholding clearance upon such a singular pretext and the Commission very properly awarded damages."

In the case of *The Splendid,* supra, the vessel was detained and later sold, on suspicion that she planned to land in Mexico articles barred by the laws of Mexico.

In awarding damages, the Claims Commission said:

> "The only reason assigned to justify the seizure of the vessel was the fact of finding on board the three boxes of soda powders, which it is alleged were prohibited by the laws of Mexico. * * * It is clearly proved that the soda powders were manifested for the United States, and that no attempt was made to introduce them into Mexico. Nothing occurred which could justify a suspicion of any intention to violate the laws of Mexico or to defraud the government. The seizure and sale of the vessel under these circumstances, upon the mere order of the judge was wholly unjustifiable and a gross violation of the laws of nations, for which the government of Mexico was justly responsible."

The Court of Claims cited no case which lays down a different rule, and we know of none. None of the cases cited by the Court of Claims in support of its decision herein has any applicability to the facts in this case, except *The Apollon,* supra, and it is an authority for petitioner's contention, not against it.

Under the terms of the Espionage Act, the President was authorized, upon the issuance of a proclamation declaring an emergency, to regulate the export of our products, and was further authorized to administer said act through such agent as he might designate. After the issuance of a proclamation declaring that an emergency existed, he issued a further order designating the War Trade Board as his agent to administer said act, which order authorized, among other things, the War Trade Board to make such rules and regulations "not inconsistent with law" as might be necessary and proper for the exercise of the powers conferred upon it (R. 182-183).

When the War Trade Board, on April 20, 1918, after the ALBYN had already been detained for practically a month,

adopted a resolution authorizing the refusal of a bunker license to vessels solely because of suspicions against the owners, masters or crews of vessels (R. 213), it exceeded the powers granted to it by the President under the aforesaid order, because such resolution was inconsistent with the law as expressed in the foregoing decisions.

2. The Court of Claims also overlooked the rule that, where there is unreasonable delay in proceedings relating to a detained ship, the detaining authorities are liable for damages therefor. It has found that the ALBYN was loading in New York from March 14th to March 22nd; was ready to sail on March 23rd, but was detained until July 24th (Special Finding of Fact No. 6, R. 6); that investigation of the suspicions of the crew was ordered on June 20th and completed on June 27th, the investigation resulting in a complete exoneration of the crew (Special Findings of Fact Nos. 13 and 14, R. 22-26). These findings demonstrate that the investigation, requiring only six days, could have been made and completed during the ten day period the ALBYN was loading and making ready to sail. If an expeditious investigation had been made, there would have been no detention or delay. The established delay or detention for 130 days is unconscionable and under such circumstances the rule is that damages are recoverable.

In the case of *United States* v. *Nuestra Senora Del Rigla*, 108 U. S. 92, a case prosecuted as a Prize Case but, in fact, a municipal seizure in port for government use, this Court said:

> "The duty of a captor is to institute judicial proceedings for the condemnation of his prize without unnecessary delay, and if he fails in this the court may, in case of restitution, decree demurrage against him as damages. This rule is well settled."

In the case of *The Remonstrant*, 3 Prize Cases During the Great War, 14, the British Privy Council said:

> "The damages for detention which were adjudged against him (the captor) were rightly given if the representative of the Crown had been guilty of undue delay, and this the learned Judge found to have been the case."

Petitioners are entitled to the benefit of this rule applied both by our own and English courts. The Court of Claims overlooked this rule or erroneously considered it inapplicable.

(C.)

The Court of Claims erred also, in holding that the uncertainty of the political situation in Russia and Finland justified the detention of the ALBYN.

Just what it was in the political situation in Russia and Finland which made it appear unsafe or unwise to our government to allow the ALBYN to sail to South Africa does not appear from any contemporary document in evidence and no explanatory evidence thereon was offered at the trial. But if it be assumed that our government feared the worst and feared that Russia, or Finland, or both, might join our enemies, this would not constitute a defense to this claim under the only known decision in point.

The only known case in point is that of *The Caroline*, 4 Moore's Int. Arb. Cas. 3665. That was a case sponsored by this government against Mexico. The *Caroline* loaded in Mexico for a United States port as the war between the two countries appeared imminent. She was refused clearance for that reason and was detained until after the port where she was detained was captured by American troops in the war which followed shortly. After the

close of the war a claim for damages for the detention was sponsored by the United States, and an award therefor was made by the Arbitrator on the ground that,

> "At the time of the seizure of the vessel in the manner stated, war had not commenced between the two countries and the proceedings complained of cannot be justified on the ground of a belligerent right of Mexico."

In *The Caroline* case, war actually followed the detention within a few days. In this case war did not follow.

(D.)

The cases cited by the Court of Claims in support of its decision are not applicable to this case.

The point upon which the Court of Claims cited its decision in the case of *Royal Holland Lloyd* v. *United States*, 73 Ct. Cls. 722, as authority for its decision herein, i. e., that while an application for a bunker license was pending the detention was not unlawful, was neither litigated nor decided in that case.

In the *Kronprins Gustaf Adolf* and *Pacific* arbitration cases, Dept. of State Arbitration Series No. 5 (6), the Arbitrator found that the ships remained here because the owners were trying to obtain assurances from England that the vessels would be allowed to proceed without interference by England on some specific voyage and that because such assurances were never obtained, the vessels were never actually ready to leave an American port. No such situation exists in this case.

In the cases of *The Schooner Exchange* v. *McFadden*, 7 Cranch 116, *Cunard Steamship Co., Ltd.*, v. *Mellon*, 262 U. S. 100 and *Hamburg American Steam Packet Co.* v. *United States*, 250 Fed. 470, the plaintiffs in each case were attempting to evade or had violated our local laws

applicable to all ships entering our ports. No such facts exist in this case.

The Olinde Rodrigues, 174 U. S. 510, and *The Thompson,* 3 Wall. 155, were prize cases. As pointed out in "(B)", reasonable grounds for suspicion is a defense in such cases, but is not a defense in cases of municipal seizures or detentions in port.

In the case of *United States* v. *Diekelman,* 92 U. S. 520, the ship was attempting to take out enemy goods, the export of which was absolutely prohibited. The vessel was notified of the specific reason for the detention; was notified that if the banned goods were removed clearance would be granted, and when the banned goods finally were removed, clearance was granted. Claim for damages for the period prior to removal of the banned goods was properly denied under such circumstances. But no such situation exists in this case.

The case of *The Apollon,* 9 Wheat. 362, is an authority for petitioners' claim, not against it. The *Apollon* was arrested and detained on suspicion of attempting to violate our local laws. Upon the trial the proof established the fact that the suspicions were groundless and damages were awarded.

(E.)

In addition to the errors discussed above, petitioners claim that there has been error in the Court's computation of damages and in disallowing interest on the damages suffered. Those two points become material, however, only in the event that the Court should find that the detention of the ship was unlawful. For that reason the points will not be argued in this brief.

(F.)

There is nothing in the rules contended for here which will hamper or restrict the government's effort in meeting the present emergency.

Under the right of angary this nation in such an emergency may detain, take or use the property of individuals of neutral nations upon the sole condition that it pay reasonable compensation therefor.

Oppenheim, International Law, Vol. 11, Sec. 365;
Borchard, Diplomatic Relations, p. 266.

It may take on suspicion ships and cargoes as prizes of war subject only to the rule that if it fails to establish the fact that they are enemy owned or enemy bound, they must be returned and to the further rule that if it fails to establish reasonable grounds for suspicion then it must pay reasonable compensation for the detention.

The Apollon, supra.

Without creating a cause for war, it may detain in ports ships suspected of an intention to aid the enemy, but upon failure to establish its suspicions as well founded in fact, then it must pay reasonable compensation therefor.

The Labuan, supra.

It has been reported in the press since our declaration of war, that the seizure of 19 Finnish vessels now in the ports of this country was in accord with the principles above set forth; that is, that this Government would pay just compensation for the ships so seized. And the same rule was invoked in the earlier seizure of numerous other foreign ships of non-belligerent nations.

While it is true that certain nations today are showing a complete disregard of all known rules of international law, order and justice, it is likewise true that this nation has always rejected such practices and has always insisted that even war must be conducted according to established rules of International Law and order, especially in so far as the interests and rights of neutrals are concerned. The reason that this nation has steadfastly urged this rule is because,

as a nation, we detest the philosophy of international law breakers, and because we feel deeply that nations, and the peoples thereof, can live decently and in peace only under equitable rules of international law and order.

So in this case plaintiffs are only asking that these long-established rules of both local and international law be applied to their claims; rules which this country itself has long championed and defended; rules which are based solely on equitable principles of fair dealing and reasonable conduct, and which are still in full force and effect.

Conclusion.

It is respectfully submitted that for the reasons set forth in the petition, this case is one calling for the exercise by this Court of its supervisory powers in order that a final determination may be had and that to such end a writ of certiorari should be granted, and that this Court should review the decision of the Court of Claims, order that its decision be reversed and direct such further proceeding as justice requires.

New York, January 3, 1942.

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1941

No. 835

A. J. ZACHARIASSEN & CO., PETITIONER

v.

THE UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CLAIMS

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Claims (R. 30–36) is not yet officially reported.

JURISDICTION

The judgment of the Court of Claims was entered June 2, 1941 (R. 36). A motion for new trial was overruled October 6, 1941 (R. 36). The petition for a writ of certiorari was filed January 3, 1942. The jurisdiction of this Court is invoked under the provisions of the Act of June 29, 1936, c. 872, 49 Stat. 2368.

QUESTION PRESENTED

Whether the refusal of the War Trade Board, from March 23, 1918, to July 12, 1918, to grant an export bunker license for necessary ship stores and supplies, constituted an unlawful detention of petitioner's sailing vessel *Albyn,* for which the United States should respond in damages.

STATUTES INVOLVED

The provisions of the Espionage Act of 1917, Title VII, Sec. 1, c. 30, 40 Stat. 225, and the special jurisdictional act of June 29, 1936, c. 872, 49 Stat. 2368, under which this claim was filed are set forth in the Appendix, *infra,* pp. 14–18.

STATEMENT

Pursuant to the private act of June 29, 1936, *infra,* p. 15, petitioner, a copartnerhip, brought suit in the Court of Claims to recover $75,635.40 damages, allegedly resulting from an unlawful detention by the United States of the *Albyn* in the Port of New York for a period of 131 days from March 22, 1918, to July 31, 1918 (R. 1–7). The petitioner alleged that the vessel was unlawfully detained because the issuance of a bunker license for necessary ship stores and supplies was refused for the purpose of detaining the vessel and for the purpose of having the vessel available for use by the United States or its allies (R. 5). The Court of Claims made detailed findings of fact (R. 8–29),

the material parts of which may be summarized as follows:

The *Albyn,* a sailing vessel of 1,993 net registered tons, was owned by a firm and persons residing in Finland (R. 10). Finland, a Grand Duchy of Russia, had declared its independence on December 6, 1917, but its independence was not recognized by the United States until 1919 (R. 10). The *Albyn* had arrived in the United States under the Russian flag, but had raised the Finnish flag while in port (R. 10).

On December 18, 1917, the vessel, then at Hampton Roads, Virginia, was chartered to the Vacuum Oil Company Proprietary, Ltd., New York, for shipment of a cargo of refined petroleum in cases from New York to one or two South African ports (R. 10). The charter was approved by the chartering committee of the United States Shipping Board on December 21, 1917, subject to the securing of an export license for the cargo (R. 10–11). It was also approved by the Inter-Allied Chartering Committee of London, England, on December 24, 1917 (R. 11). Prior to December 18, 1917, the Vacuum Oil Company was granted a license to export the cargo subject to revocation without notice (R. 11). The *Albyn* arrived in New York from Hampton Roads, Virginia, on February 14, 1918, loading was completed on March 22, 1918, and the charterer paid the total freight of $98,897.25 (R. 11).

On March 18, 1918, the agent of the owner of the *Albyn* filed with the War Trade Board[1] an application on behalf of the vessel for a bunker license for the necessary ship stores and supplies (R. 16). The application stated that the ship stores and supplies required for the voyage were to be taken out of the country and were to be sufficient to cover a 10-month period (R. 16–17). The ship stores and supplies required for the voyage, were goods and commodities of the class which under the law and proclamations of the President, and the rules and regulations made pursuant to law, could not be exported or taken out of the United States without a license from the War Trade Board (R. 17). On March 22, 1918, an application for clearance, not accompanied by a bunker license from the War Trade Board, was made to the collector of customs of New York. The application was refused solely on the ground that no bunker license for the needed stores and supplies was presented (R. 17).

Early in April 1918 the War Trade Board and the Shipping Board were concerned as to the attitude of the crews of the *Albyn* and other vessels similarly situated, the "present personnel" being regarded as an "undesirable risk no matter what guarantees were given" (R. 18). In the same

[1] Finding 7 (R. 11–14) sets forth in detail the manner in which authority was placed in the War Trade Board to issue, withhold, or refuse licenses for exportation of all articles except coin, bullion or currency.

month the War Trade Board received the opinion of the State Department that the vessels not be permitted to proceed, and information from the Shipping Board that some of the crew "were openly pro-German" (R. 1820). On April 21 the Board authorized its Bureau of Transportation to refuse licenses for bunkers to vessels whose crews were suspected of enemy affiliation (R. 21–22). Shortly thereafter the Navy was requested to keep the vessels and crews under observation until a definite decision was reached (R. 21–22).

While the application was under consideration, the agent of the vessel expressed doubt as to the responsibility of the crews and a representative of the Shipping Board suggested that for the safety of the ships and cargoes, the Shipping Board might charter them on a bare-boat basis (R. 19). Negotiations with respect to the chartering of the vessels ensued, but the matter was never formally considered by the Shipping Board, and the negotiations were terminated on June 10, 1918 (R. 20–23).

On June 21, 1918, the Director of the Bureau of Transportation of the War Trade Board requested the Navy Intelligence of the Navy Department to examine the crews of the vessels for the purpose of determining if the crews of the vessels were "Bolsheviki" or sympathetic with the "bolshevik" regime (R. 24). The investigation so requested disclosed that the captains and crews of the various vessels, including the

Albyn, had no Bolshevik inclinations (R. 25). This report of the Navy Intelligence was laid before the War Trade Board on July 8, 1918, and on July 9, 1918, the board approved the issuance of bunker licenses (R. 26).

During the period in question, at the request of the Secretary of the Navy (R. 14, 179–182), it was against the policy and regulations of the War Trade Board to issue bunker licenses for sailing vessels for a voyage into the submarine war zone because of the possibility of such supplies falling into the hands of enemy craft (R. 15). The actual sailing route taken by the *Albyn,* after the bunker license had been granted, is not shown because the vessel's log book had been destroyed, but the log books of certain other sailing vessels bound upon substantially the same voyage as the *Albyn,* and comprehended in the same special act, disclose that the course followed passed through the defined submarine zone (R. 16). The War Trade Board issued bunker licenses to a number of sailing vessels bound in the direction of South Africa, but there were considerations in respect of the safety of the vessels, cargoes, and stores not present in the case of the *Albyn* [2] (R. 16).

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[2] The record shows that the charterer, in all except three instances, was either the Shipping Board or agents for the British Ministry (R. 115). The nature of the cargo carried by most of these vessels is not shown (R. 214A). It accordingly appears that, notwithstanding the contention to the contrary made by petitioner (Pet. p. 18), there was evidence

On July 12, 1918, a bunker license was issued to the *Albyn* by the War Trade Board (R. 27). The *Albyn* applied for and obtained clearance on July 24, 1918, and sailed on July 31, 1918 (R. 28). The sailing of the *Albyn* was delayed for a period of 130 days as a result of the delay and refusal of the War Trade Board to grant a bunker license for stores and supplies (R. 28).

The court below found that the conditions and circumstances which formed the basis of the failure of the War Trade Board to grant the license for necessary ship stores and supplies without which the ship could not sail were (a) the probability that the vessel would proceed through the war danger zone, and due to its rate of travel, would be seized, together with its cargo and stores, by enemy craft; (b) the uncertainty of the political situation in Russia and Finland; and (c) the character and responsibility of the officers and crews of the vessels (R. 27). The court specifically found that there was no detention of the vessel for the purpose of compelling the owner thereof to charter it to the United States (R. 27), and that the detention of the *Albyn* by the United States was not unlawful (R. 28). The court accordingly entered judgment dismissing the petition (R. 36). Although it was unnecessary so to

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to support the finding of the court below that the decision as to these vessels may have been prompted by different considerations (R. 16).

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do, the court further found that if the United States had unlawfully detained the *Albyn*, the damage to which petitioner would be entitled would be $61,139.62 without interest.

ARGUMENT

The alleged detention of the *Albyn* consisted solely of the refusal to permit the vessel to export ship stores and supplies out of the United States.[3] Petitioner, relying upon authorities relating to the seizure of vessels, contends that the refusal to issue a bunker license to the *Albyn* was unlawful. The argument fails to distinguish between the seizure of vessels of foreign nationality and the regulation of the exportation of goods from the United States, misconceives the scope of the authority conferred upon the Board, and is plainly untenable.

1. The Board's refusal to issue a license prior to July 12, 1918, violated no domestic law. The Espionage Act of 1917, Title VII, Section 1, c. 30, 40 Stat. 225, expressly authorized the President during the war to prohibit by proclamation the exportation of any article from the United States except in accordance with the orders and regulations of the President. The President by proclamation, first effective July 15, 1917, prohibited the un-

[3] It is not suggested by petitioner that the *Albyn* could have sailed or proposed to sail without obtaining ship stores and supplies for its voyage.

licensed exportation of bunkers (40 Stat. 1683, 1691, 1746).[4] By Executive Order of October 12, 1917, the President vested in the War trade Board authority to "issue licenses under such terms and conditions as are not inconsistent with law" or "to withhold or refuse licenses, for the exportation of all articles" (R. 13–14). The Board thus plainly had the power to deny a license for bunkers for the *Albyn*.

2. The propriety of the Board's conduct cannot be judicially reexamined. The Board was acting on behalf of the President in performing one of his numerous war time duties. The Act in express terms authorized the President to prohibit exports whenever he found that the "public safety" so required, and to make exceptions for exports "at such time or times, and under such regulations and orders, and subject to such limitations and exceptions as the President shall prescribe." The Act left to the President the sole determination as to what exportations would not be consistent with the "public safety." Plainly the President's conduct in carrying out such a function in time of war is not subject to judicial review. This Court has so held in analogous circumstances. *Dakota Central Telephone Co.* v.

[4] These proclamations prohibited exports to all countries in the world, including "Great Britain, her colonies, possessions, and protectorates" (which would include South Africa), and Russia. Finland was not listed, apparently being regarded as a part of Russia.

South Dakota, 250 U. S. 163, 184; *United States v. Chemical Foundation, Inc.*, 272 U. S. 1, 15; *Martin* v. *Mott*, 12 Wheat. 19, 30–33. Cf. *United States* v. *Bush & Co.*, 310 U. S. 371, 379.

Reference to the factors responsible for the action of the War Trade Board in this case will demonstrate that the reasons underlying the exercise of discretion in such matters cannot be reexamined by the courts. The court below found (R. 27) and the record indicates that the Board's decision was motivated by two factors: (1) the policy against permitting sailing vessels to travel through the war zone,[5] and (2) a question as to the pro-German sympathies of the crew of what was referred to interchangeably as a Russian, Russian-Finnish and Finnish vessel (R. 17). In connection with the first point, the Secretary of the Navy had requested that sailing vessels be kept out of the war zone because of the ease with which their supplies could be seized and availed of by submarines (R. 179–182), and the Board had issued instructions to that effect (R. 181–182). The

[5] Although there is no reference in the record to any direct statement by the Board showing its action in this particular case to have been motivated by the policy against permitting sailing vessels to go through the war zone, the court below was warranted in inferring that the board was influenced by its rule (R. 181–182) that licenses not be granted in such circumstances. Even if material, direct testimony as to what was in the minds of the members of such a board would be difficult to produce nearly twenty years after the event.

route of petitioner's vessel would probably have passed through the war zone (R. 16).[6] On the second point uncertainty as to the relationship between Russia and the Allies after Russia's withdrawal from the war against Germany in 1917 was doubtless material. And although Finland had declared its independence of Russia in December 1917, it was not recognized as a separate nation by the United States until May 1919 (R. 10). The importance of the pro-Germany sympathies of the crews of sailing vessels passing through the war zone is demonstrated by a letter from the Secretary of the Navy implying that some sailing craft had been used to supply submarines with fuel (R. 179).

An object of Title VII of the Espionage Act was to protect the public safety by preventing needed supplies from falling into the hands of powers unfriendly to the United States. Officials charged with the enforcement of such a statute in time of war would reasonably and lawfully refuse to license the export of commodities unless and until entirely satisfied that they would not come into the hands of hostile powers.

3. The words "as are not inconsistent with law" in the Executive Order establishing the War Trade Board (R. 14), relied on by petitioner (pp.

[6] Inasmuch as the *Albyn's* log book had been destroyed before the trial, there was no evidence of the actual route taken after the bunker license was granted. But the log books of other vessels bound upon substantially the same voyages showed that the sailing route went through the war zone (R. 16).

21–22), relate only to the "terms and conditions" of a "license", and do not qualify the authority conferred on the Board by the President "to withhold or refuse" licenses. Moreover, the authorities cited by petitioner (Br. pp. 19–21) deal solely with the seizure of vessels and do not establish any rule of "law" which may be read into the Espionage Act or the authority delegated pursuant thereto as a limitation on the manner of regulating exports. Certainly neither Congress nor the President intended that because the refusal to issue an export license might prevent a vessel from sailing, licenses could be withheld only when justified by the preexisting law applicable to prizes or the seizure of vessels.[7] There is nothing in the Espionage Act or in the Executive Order constituting the War Trade Board which suggests any such restrictive requirement. On the contrary, the standard was to be the "public safety" of the United States.

4. The Board's refusal to grant a bunker license likewise violated no rule of international law.[8] It cannot be doubted that, under the law

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[7] It is unnecessary to consider, therefore, whether, as suggested by petitioner, a distinction exists between the grounds which warrant a capture at sea under the law of prize and those which justify the municipal seizure of a vessel.

[8] We assume for the purposes of argument that the jurisdictional act authorizes the Court of Claims to determine whether the denial of a license violates the law of nations. Cf. *Royal Holland Lloyd* v. *United States*, 73 C. Cls. 722, 734–736.

of nations, the United States may prohibit or regulate the exportation of any article produced in or which has become part of the general mass of goods of the United States. *Royal Holland Lloyd* v. *United States,* 73 C. Cls. 722, 742; *Swedish Arbitration Claims,* Department of State Series No. 5 (6), 26 Am. J. Int. L. 834, 874.[9] The authorities cited by petitioner, as previously observed, involve the seizure of vessels and do not even remotely suggest that the denial of a license for exports which may incidentally prevent a vessel's departure for lack of necessary provisions constitutes a seizure.

CONCLUSION

For the foregoing reasons it is respectfully submitted that the petition for a writ of certiorari should be denied.

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FEBRUARY 1942.

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[9] Whether the United States may exercise a like authority with respect to goods *in transit* consistently with international law is a question not presented here. Cf. *Royal Holland Lloyd* v. *United States, supra.*

APPENDIX

1. The Espionage Act of 1917, Tit. VII, Section 1, c. 30, 40 Stat. 225, provides as follows:

TITLE VII

CERTAIN EXPORTS IN TIME OF WAR UNLAWFUL

SECTION 1. Whenever during the present war the President shall find that the public safety shall so require, and shall make proclamation thereof, it shall be unlawful to export from or ship from or take out of the United States to any country named in such proclamation any article or articles mentioned in such proclamation, except at such time or times, and under such regulations and orders, and subject to such limitations and exceptions as the President shall prescribe, until otherwise ordered by the President or by Congress: *Provided, however,* That no preference shall be given to the ports of one State over those of another.

SEC. 2. Any person who shall export, ship, or take out, or deliver or attempt to deliver for export, shipment, or taking out, any article in violation of this title, or of any regulation or order made hereunder, shall be fined not more than $10,000, or, if a natural person, imprisoned for not more than two years, or both; and any article so delivered or exported, shipped, or taken out, or so attempted to be delivered or exported, shipped, or taken out, shall be

seized and forfeited to the United States; and any officer, director, or agent of a corporation who participates in any such violation shall be liable to like fine or imprisonment, or both.

SEC. 3. Whenever there is reasonable cause to believe that any vessel, domestic or foreign, is about to carry out of the United States any article or articles in violation of the provisions of this title, the collector of customs for the district in which such vessel is located is hereby authorized and empowered, subject to review by the Secretary of Commerce, to refuse clearance to any such vessel, domestic or foreign, for which clearance is required by law, and by formal notice served upon the owners, master, or person or persons in command or charge of any domestic vessel for which clearance is not required by law, to forbid the departure of such vessel from the port, and it shall thereupon be unlawful for such vessel to depart. Whoever, in violation of any of the provisions of this section shall take, or attempt to take, or authorize the taking of any such vessel, out of port or from the jurisdiction of the United States, shall be fined not more than $10,000 or imprisoned not more than two years, or both; and, in addition, such vessel, her tackle, apparel, furniture, equipment, and her forbidden cargo shall be forfeited to the United States.

2. The Act of June 29, 1936, c. 872, 49 Stat. 2368, provides:

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That jurisdiction be, and is hereby, conferred upon

the Court of Claims, notwithstanding any lapse of time or any statutes of limitations, to hear, examine, and adjudicate claims against the United States on the part of owners of certain Finnish sailing vessels, to wit: Glenard, Kensington, Vidylia, Parchim, Woodburn, Port Patrick, Grace Harwar, Professor Koch, Prompt, Albyn, Rowena, Fahrwohl, and Pampa, for damages said to have been sustained as a result of the alleged refusal of representatives of the United States to permit said vessels to sail from United States ports during the period between March 18, 1918, and November 26, 1918: *Provided*, That such suit or suits shall be brought within three months after the date of the approval of this Act.

SEC. 2. In determining the said claims, the Court of Claims shall pass solely on the following questions:

1. Were the thirteen Finnish sailing vessels named herein, or any one or more of them, detained by the United States?

2. If the preceding question is answered in the affirmative, was such detention unlawful?

3. If the second question is answered in the affirmative, is the United States obligated to indemnify the owner or owners, or their successors in interest, of the vessel or vessels found to have been unlawfully detained?

4. If the third question is answered in the affirmative, what indemnity should be paid by the United States with respect to each vessel found to have been unlawfully detained?

SEC. 3. The claims shall be prosecuted in the name of the owner or owners or manag-

ing owner or owners of the said several ships. If the Court of Claims, or the Supreme Court on appeal, decides that the United States is obligated to indemnify the owner or owners, or their successors in interest, the amount of the indemnity shall be paid by the United States to the Envoy Extraordinary and Minister Plenipotentiary of the Republic of Finland then resident in the United States, for the use and benefit of the owner, owners, or their successors.

SEC. 4. In determining the aforesaid claims, the Court of Claims shall receive and consider the evidence and arguments contained in (a) the record mentioned in the note of the Minister of Finland to the Secretary of State, dated February 1, 1935; (b) the answer mentioned in the note of the Secretary of State to the Minister of Finland, dated March 4, 1935; and (c) the reply and additional material mentioned in the note of the Minister of Finland to the Secretary of State, dated April 12, 1935, relating to said claims.

Neither party shall be entitled as of right to present as evidence documents other than those specified herein, except copies of other correspondence pertinent to the case exchanged between the Department of State and the Legation of Finland: *Provided,* That the court shall be authorized to require the production of such additional evidence as the court deems material.

SEC. 5. A copy of the petition or petitions of the owner or owners of each of the said sailing vessels shall be served upon the Attorney General of the United States and he, or some attorney or attorneys designated by him, shall appear and defend the

interests of the United States in such case or cases. Jurisdiction is hereby conferred on the Supreme Court to grant a writ of certiorari to the Court of Claims on the petition of any party to any of the aforesaid cases, to review any determination that may be rendered by the Court of Claims under the terms of this Act.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

Denied

No. 835

J. A. ZACHARIASSEN & CO.,

Petitioners,

vs.

THE UNITED STATES.

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CLAIMS.

PETITIONERS' REPLY BRIEF.

JOHN G. POOLE,
Counsel for Petitioners.

JAMES C. WEBSTER,
ALFRED J. L'HEUREUX,
Of Counsel.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

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J. A. ZACHARIASSEN & CO.,

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THE UNITED STATES.

PETITIONERS' REPLY BRIEF.

A.

The statement on page 8 of the government's brief that the detention of the ALBYN consisted solely of the refusal to permit the vessel to export ship's stores and supplies is not accurate. It is true that the refusal of a bunker license authorizing export of those stores and supplies prevented the ALBYN from obtaining a clearance and sailing, because Section 3 of the Espionage Act required the Collector to refuse clearance unless a license was presented. But the offer of the Shipping Board to cause the ALBYN to fulfill her charter with Vacuum Oil Company if she were chartered to it (R. 127)—which proposition, if fulfilled, would have required the export of the same stores and supplies—is conclusive evidence that the refusal to grant a bunker license was not for the purpose of preventing the export of those articles, but was for the purpose of detaining the ship. The refusal of the bunker license was merely the means used for detaining the ship.

B.

The statement on page 3 of the government's brief, as well as on other pages thereof, that the propriety of the Board's conduct in refusing a bunker license for ship's stores and supplies cannot be judicially re-examined, involves questions of both local and International Law. It involves the question whether the action of the Board was within or beyond the provisions of the local statute. It involves the question whether, even though within the provisions of the local statute, the action was in accord with, or contrary to, the rules of International Law, because this Court has consistently held that where local and International Law conflict, the former must give way. These questions cannot be fully or properly argued within the limits of a brief on a petition for a Writ of Certiorari. In such a brief we feel restricted to pointing out that the decisions cited in our main brief, laying down rules of both local and International Law, hold that the detention of a vessel in port, upon unfounded suspicions, either in war or peace time, is unlawful, and burdens the detaining government with the responsibility of paying just compensation therefor.

C.

With commendable frankness, counsel for the government in the footnote on page 10 of their brief, concedes that there is no direct evidence in the record to support the finding of the Court below that one of the reasons for the detention of the ALBYN was the probability that the vessel would proceed through a proscribed danger zone. This concession relieves the Court of the burden of examining the facts in the record in considering the 3rd question posed in our petition.

D.

The interpretation of the Executive Order by which the President vested the War Trade Board with authority to

administer the Espionage Act as set forth on pages 11 and 12 of the government's brief is unwarranted. The terms of the Order are clear. Paragraph VIII, the pertinent part thereof (R. 183), reads as follows:

> "The said War Trade Board is hereby authorized and empowered to take all such measures as may be necessary or expedient to administer the powers hereby conferred. And I hereby vest in the War Trade Board the power conferred upon the President by Section 5(a) to make such rules and regulations, not inconsistent with law, as may be necessary and proper for the exercise of the powers conferred upon said board."

That is to say, the acts of the War Trade Board must be "not inconsistent with law." Not inconsistent with either local or International Law.

In refusing a bunker license upon mere suspicion (uninvestigated for over three months and then proven unfounded within one week of the day investigation was ordered), and thus detaining for four months, a vessel whose cargo was licensed by it for export under a charter approved by proper government authorities, the War Trade Board clearly violated both local and International Law and therefore violated the Executive Order.

Respectfully submitted,

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